and they must be held binding on the plaintiff. This is in accordance with the principle expressed by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.* (1) in these words:

"It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results.....afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

In another form the same principle was applied in *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (2), *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* (3), and *Lyle-Meller* v. *Lewis & Co. Ltd.* (4), where it was laid down that if an assurance was intended to be acted upon, and it was acted upon by one party who altered his own position on the faith of it, it must be held binding on the other. In my judgment the action must on this ground alone be dismissed with costs.

A further ground for dismissing this action is that, on the evidence, it is clear beyond peradventure, by the letters of July 14, 1956 and August 25, 1958, that the plaintiff, both as chargee and as a co-proprietor, had in fact agreed to a subdivision or partitioning of the land into two equal portions so that the front half should remain in the defendant's occupation. The allegation that the house was erected without the plaintiff's permission is completely false. That lie is conclusively nailed by the delivery to defendant on October 3, 1958 of the document of title with a warning against any encroachment of the building then in progress upon the plaintiff's own portion. I accordingly find as a fact that the defendant had built his house on the faith of an agreement with the plaintiff for partitioning of the land so that each party should be sole owner of the portion under his own exclusive occupation. Such an agreement affords a complete answer to the plaintiff's claim.

The letter of January 24, 1959 leaves no room for misapprehension as to the reasons which caused the plaintiff to institute this action. His discovery of the zoning restrictions, however, affords no ground for his resiling from the agreement. I am reminded of the words of Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co. Ltd.* (5) that "Rights ought not to be left in suspense or to hang on the chances of subsequent events." The simple truth is that the plaintiff had been disappointed in his expectations of profit from his investment. It is not due to any default on the part of the defendant. This attempt by an opulent moneylender such as the plaintiff to recoup his losses at the expense of the little man in the circumstances of the defendant is heartless and unconscionable, and I am greatly relieved not to find myself obliged to make any order to assist the plaintiff in his salvage operations. The claim is accordingly dismissed, with costs to be taxed against the plaintiff on the higher scale.

Action dismissed.

Solicitors: *Shearn Delamore & Co.; Doraiswamy Aiyer & Kok Thoy.*

MALBAI v. NAWI

[A.C.J. (Rigby J.) June 23, 1961]

[Penang — Civil Appeal No. 1 of 1961]

Tort — Assault — Claim for damages for personal injuries caused — Assault by two persons — Compromise with one — Whether compromise bar to action against the other.

For a defendant to be able to avail himself of the general rule that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all, it is not sufficient to show that there was a similarity of design on the part of the defendants causing independent damage. What must be proved is that there was concerted action towards the common end.

Case referred to:—

(1) *Duck* v. *Mayeu*, [1892] 2 Q.B. 511 at p. 513.

CIVIL APPEAL.

Triptipal Singh for the appellant.

David Choong for the respondent.

Cur. Adv. Vult.

Rigby J.: This is an appeal from a decision of Mr. Au Ah Wah, the then President of the Sessions Court, dismissing the plaintiff's claim against the defendant for damages for personal injuries sustained by the plaintiff at the hands of the defendant.

The facts are relatively simple. An angry exchange of words, culminating in a fight, took place between the plaintiff and the defendant in front of the plaintiff's premises at Gurney Drive on the afternoon of the 10th October, 1959. At some stage in the fight one Mat Yusi bin Mawal, a nephew of the defendant, intervened on his behalf, and at some stage, whether in the course of the actual fight between the plaintiff and the defendant, or after that fight had actually terminated, Mat Yusi himself assaulted the plaintiff. The plaintiff said in evidence that the defendant struck him with a piece of iron over the right eye. The plaintiff was admitted to hospital and, upon examination, he was found to have a big linear cut on the right eye-brow. His nose was swollen and he was bleeding from it. An X-ray examination disclosed a fracture of the nasal bone. The medical report also shows, incidentally, that he was found to be suffering from tuberculosis of the lungs. He remained in hospital for 10 days. As a result he lost his employment and was unemployed for two

months. On the 24th day of November, 1959, he took a private summons for criminal assault against the defendant and on the 10th day of December the defendant admittedly pleaded guilty to that charge. Thereafter, he also took out a summons for assault against Mat Yusi, but that summons appears to have been compromised by the payment of $50 as agreed compensation to the plaintiff as *per* the receipt issued by the plaintiff's advocate.

The substantial defence put forward by the defendant in this case before the learned President and, indeed, accepted by him, was that this was a joint assault by the defendant and Mat Yusi, giving rise to a joint cause of action, at the instance of the plaintiff against both of them, and that the payment by either one of them of compensation, and the acceptance of that compensation by the plaintiff, constituted full accord and satisfaction of the cause of action and operated as a discharge against both of them. The law is very clearly set out in *Clerk and Lindsell's* textbook on the Law of Torts, 10th edition, page 263, * in the following passage:—

"The general rule is, that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all. If accord be made with one joint tortfeasor and satisfaction accepted, or if he be released, all others are discharged. 'It is, we think, clear law that a release granted to one joint tortfeasor or to one joint debtor operates as a discharge to the other joint tortfeasor or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. (*Duck* v. *Mayeu* (1) at p. 513, *per* A. L. Smith L.J.)'."

In support of the argument that the defendant and Mat Yusi were joint tortfeasors Mr. David Choong, for the defendant, contended, with great cogency, that Mat Yusi had, in the first instance, assisted the defendant in the assault and that when the defendant was injured and he took him away he returned to continue the assault upon the plaintiff. He argued, in effect, that there was a common purpose to assault the plaintiff and that Mat Yusi, in later returning to the attack after he had removed his uncle from the scene of battle, was merely continuing that purpose and that he had never abandoned the original intention or common purpose to assault the plaintiff. *Clerk & Lindsell,* in dealing with the question of joint tortfeasors, point out, at page 100, that "mere similarity of design on the part of the independent actors, causing independent damage, is not enough; there must be concerted action towards the common end." In view of the arguments raised it becomes necessary to examine the evidence. The defendant himself said in evidence that there was a quarrel between himself and the plaintiff and they fought. He said:—

"When plaintiff and I fought no one else joined in."

In cross-examination he said:—

"Mat Yusi did not take part in the fight. He came to separate."

Mat Yusi himself said in cross-examination:—

"I saw them fighting. I went to assist. Defendant was dazed. He could not see me. I assisted my uncle from the ground. I then went for defendant. I lifted up defendant and dragged him to my house. His head was broken. I treated his injury. Then I went to hit plaintiff..... I hit plaintiff on the back. I did not hit him elsewhere."

On that evidence it seems to me abundantly clear that there were separate and distinct assaults upon the plaintiff giving rise to two separate causes of action. With respect to the learned President I am, therefore, unable to agree that the defendant and Mat Yusi were joint tortfeasors, and that the receipt by the plaintiff of $50 as compensation paid in settlement of the assault case brought by him against Mat Yusi constituted an accord and satisfaction of his claim against both Mat Yusi and the defendant, so as to operate as a discharge by him of any claim he might have against the defendant arising out of the defendant's assault upon him. In my view, he was entitled to bring a separate and independent action for damages for personal injuries against the defendant and, upon the evidence adduced before the learned President, to succeed in his claim. The evidence of Mat Yusi is that he struck the plaintiff on the back and nowhere else. That evidence was not challenged by the defendant in re-examination. If that evidence be accepted it is clear, therefore, that the injury to the plaintiff's face, including the fracture of the nasal bone, was caused by the defendant. The defendant, by his statement of defence, admitted the assault, but said that it was for a good reason. The onus of proving justification for the assault, therefore, shifted to him, and it is clear from the evidence that he failed to discharge that onus.

The plaintiff stated, and it is not disputed, that as a result of his injury he was detained in hospital and lost his job which would bring him in $80 per month, and was unemployed for two months. The plaintiff is, therefore, entitled to succeed in his claim for special damages for loss of earning for two months' employment at the rate of $80 a month. The remaining claims for special damages brought by the plaintiff — claims for loss of clothing and of his bicycle, etc. — were in no way substantiated and must be dismissed. The plaintiff is certainly entitled to general damages for pain and suffering incurred by him, and I assess such damages at $100.

In the result, this appeal must accordingly be allowed, the decision of the learned President set aside, and the plaintiff awarded the sum of $260 being $160 special damages for two months' loss of earning, and $100 general damages for pain and suffering incurred by him as a result of the personal injuries inflicted upon him by the defendant.

The defendant must pay the taxed costs of this appeal, together with half the plaintiff's taxed costs incurred in the proceedings in the Court below.

Appeal allowed.

Solicitors: *Triptipal Singh; Lim, Lim & Oon.*

* See now 11th Edn., para. 528, pp. 279-280.

PUBLIC PROSECUTOR v. KOO GEE LEONG & ORS.

[A.C.J. (Adams J.) July 17, 1961]

[Muar — Criminal Appeal No. 39 of 1961]

Penal Code, s.160 — Affray by fighting in public — Whether there must be disturbance of public peace for charge to be upheld — Position of person who is assaulted but who does not retaliate.

When there is a fight in a public place with blows struck, there is a disturbance of the peace and no further proof by the prosecution is necessary.

If a person is attacked by another in a public place and he makes no retaliation whatsoever, he cannot be guilty of fighting in public.

CRIMINAL APPEAL.

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the appellant.

C. Paramjothy for the 1st respondent.

Miss Mary Lim for the 2nd–7th respondents.

Adams J.: This was an appeal by the Deputy Public Prosecutor against the acquittal by the learned Magistrate, Segamat, of 7 persons who were charged with an affray by fighting in public contrary to section 160 of the Penal Code.

The facts are that on the evening of the 20th September, 1960, at Jalan Omar, Pekan Jabi, Segamat there was a political meeting in connection with the recent Town Council elections. Apparently members of the rival party created a disturbance by driving motor cars and motor cycles past the area of the meeting sounding their horns violently. One of the prosecution witnesses got up on the platform and appealed to the rival party not to drive the vehicles and sound their horns noisily. The first defendant who was taking part in the meeting on his way home was attacked by the other six defendants. The six defendants who were from the rival party also attacked the second witness for the prosecution who managed to break loose and run away.

The Magistrate found that there had been a fight between two or more persons and that the fight was in a public place but refused to call on the defence because he said that there was no evidence that the fight must have disturbed the public peace. It was because of this finding that the learned Deputy Public Prosecutor appealed.

I think the learned Magistrate had misunderstood the commentary given in *Ratanlal* (19th Edition), pages 372 & 373. It says this:

'Disturb the public peace.' — It is essential that there must be a disturbance of the public peace. — The offence under this section postulates the commission of a definite assault or breach of the peace. Mere quarrelling in a street over money matters without exchange of blows is not sufficient.

This clearly postulates that once there has been a fight with blows struck, there has been disturbance of the peace and no further proof by the prosecution is necessary. This is also so in England.

Under the English Common Law an affray is a public offence to the terror of the Queen's subjects and all the prosecution has to prove is that the prisoners fought in a public street or highway. (See *Archbold*, 23rd Edn., p. 1308). *

The learned Magistrate was therefore wrong in holding that there was no case to answer in the case of defendants 2, 3, 4, 5, 6 and 7. He was however correct (but for the wrong reason) in holding that there was no case to answer in the case of Koo Gee Leong the 1st defendant because he was attacked by the other 6 defendants and in so far as the evidence of the prosecution goes he retaliated in no way whatsoever and therefore cannot be said to have been fighting.

The learned Deputy Public Prosecutor has said that he does not wish to take the matter any further. He merely wishes the Magistrate's erroneous conception of what had to be proved in a case of this nature be put right. Although, therefore, I would allow the appeal, I make no order thereon.

Appeal allowed.

Solicitors: *P. T. Wong & Co.; L. Rayner.*

* See now 24th Edn., p. 1343.

TAN CHWEE SENG v. REGINA

[A. Cr. J. (Rose C.J.) August 9, 1961]

[Singapore — Magistrate's Appeal No. 92 of 1961]

Secret Society — Accused having tattoo mark used by member of Secret Society — Accused to give acceptable explanation — No supporting evidence adduced to corroborate appellant's story — Societies Ordinance (Cap. 228), s.12.

Sentence — Whether maximum sentence justified.

The appellant was convicted of being a member of an unlawful secret society under section 12(1) of the Societies Ordinance. The Prosecutor produced expert evidence to show that the accused had on his right arm a tattoo mark which identified him as a member of the 24 Group Secret Society. The appellant stated that he was not a member of a secret society and that he had acquired the mark some ten years previously. He also produced his relatives to give evidence to the effect that he was not a member of the said secret society.

Held: it is for the accused to give an acceptable explanation as to why the tattoo mark is to be found upon his person and as in this case no supporting evidence was adduced to corroborate the appellant's statement that he received the tattoo mark some ten years ago and was always unaware of its significance, the conviction must stand.

Cases referred to:—

(1) *R.* v. *Lim Chin Shang*, [1957] M.L.J. 125.

(2) *Wong Thin* v. *Public Prosecutor*, [1958] M.L.J. 29.

MAGISTRATE'S APPEAL.

David Marshall for the appellant.

A. W. Ghows (Senior Crown Counsel) for the respondent.

Rose C.J.: The appellant was convicted in the First Criminal District Court of being a member of an unlawful society, to wit, the 24 group secret society, contra section 12(1) of the Societies Ordinance (Chapter 228).

The case for the prosecution was that there was tattooed upon the upper part of his right